MOTION FILED

AUG 15 2005

23

No. 04-1144

In The
Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF MINNESOTA GOVERNOR TIM PAWLENTY AND NORTH DAKOTA GOVERNOR JOHN HOEVEN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Governors of Minnesota and North Dakota.

North Dakota and Minnesota currently have the nation's first and fourth lowest pregnancy rate among minors, respectively. In recent decades, Minnesota has reduced the rate of pregnancies among girls aged 15 to 17 by nearly 50 percent. This decline is due in part to the state's parental notification law, which is similar to the New Hampshire statute in the case at bar.

North Dakota law requires the consent of the minor and both parents prior to the performance of an abortion. N.D. Cent. Code §14-02.1-03.1. The only two exceptions are cases involving judicial bypass, and emergencies where the abortion is necessary to preserve the minor's life. *Id.* There is no exception to preserve the health of the minor. This law has been in effect since 1981.

The Minnesota law provides for a physician to forego notification in cases in which "the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice." Minn. Stat. §144.34, subd. 3(4)(a). There is no comparable exception to prevent harm to a minor's health in the Minnesota law.

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[1] No counsel for any party authored any portion of this brief. No persons other than *amici curiae*, or his counsel have made a monetary contribution to the preparation and submission of this brief.

In the almost twenty years that Minnesota has required some form of parental notification, with no express exception for health-related emergency, there have been no reports of adolescent maternal mortality or morbidity due to delays for parental notice.

The resolution of the present case will affect the constitutionality of the Minnesota and North Dakota statutes – and could potentially undermine the ability of parents in these states to protect young woman against predation by older men.

Amici curiae believes that their perspective will complement the brief of the Petitioner and assist the Court in the resolution of the issues presented by this case.

SUMMARY OF ARGUMENT

A growing body of scientific literature evidences the benefits of parental contact and authority throughout a child's life.[2] During the past two decades that Minnesota and North Dakota have required abortion providers to involve parents in their daughters' decisions to obtain abortions, these states have enjoyed *both* declining teen pregnancy rates as well as declining abortion rates. The absence of an expansive "health exception" that can be invoked by abortion providers has not resulted in the reporting of increased health complications of minors – but

[2] Minn. Dept. of Health, HEALTHY MINNESOTANS: STRATEGIES FOR PUBLIC HEALTH VOL. 2 (2002).

rather, has worked to avoid the predation of young women that has been seen in other states.

The historical recognition of the value of parental involvement in their children's lives, combined with the experience of Minnesota and North Dakota, argues for reversal of the lower courts and affirmation of the constitutionality of the New Hampshire law at issue in this case.

ARGUMENT

I. Parental Involvement Laws Contribute to Teen Well Being.

A. Parental Involvement Laws Insure that Parents Can Protect Their Daughters From Continuing Abuse By Adult Men.

While "[v]ery little attention is given to the important role that parents play in the healthy development of their adolescent children . . . [t]heir importance in the lives of their teens is strongly supported in research, particularly current research on resiliency." Minn. Dept. of Health, HEALTHY MINNESOTANS: STRATEGIES FOR PUBLIC HEALTH VOL. 2 (2002). Minnesota's and North Dakota's experience with their parental notification and consent requirements, respectively, makes this conclusion very plain – parental involvement makes for healthy children – and counsels against this Court from placing a constitutional bar upon needed and beneficial involvement laws.

Research consistently reveals that greater parental supervision and involvement is related to "delaying sexual initiation, using dual contraception, and being less likely to become pregnant or acquire an STD." Mary B. Short &

Susan L. Rosenthal, *Helping Teenaged Girls Make Wise Sexual Decisions*, 48 Contemp. OB/GYN 84 (2003).

In a study of 609 teenage females, who had been recruited from neighborhoods characterized by high rates of unemployment, substance abuse, violence, and STDs, the girls who reported less parental monitoring were 2.5 times more likely to become pregnant in the six month follow-up period than those who reported greater parental involvement. This finding led researchers to conclude that "interventions designed to increase parental monitoring or adolescent females' perceptions of their parents' monitoring may be effective components of pregnancy prevention programs designed for minority youth." Richard A. Crosby *et al.*, *Low Parental Monitoring Predicts Subsequent Pregnancy Among African-American Adolescent Females*, 1 Pediatric & Adol. Gynec. 43, 45 (2002).

Similarly, a study of 522 females found:

> Adolescents with less parental monitoring were significantly more likely than those perceiving more parental monitoring to report that they did not use condoms during their most recent act of sexual intercourse or to report that they did not use any kind of contraception during their last 5 intercourse occasions. Less perceived parental monitoring was marginally associated with reporting multiple sex partners in the past 6 months and having a sex partner who is believed to have concurrent sex partners. Past and recent use of marijuana was associated with less perceived parental monitoring, as was recent use of alcohol. Adolescents who perceived less parental monitoring were also more likely to report that they had been arrested. Of importance, adolescents reporting less parental monitoring were 1.7 times more likely to have a laboratory-confirmed STD.

Ralph J. Diclemente, *et al.*, *Parental Monitoring: Association with Adolescents' Risk Behaviors*, Pediatrics 1363, 1365 (June 2001).

A state's parental notification or consent requirement plays a role in preventing sexual abuse of minors by insuring that adult sexual predators cannot cloak such relationships in secrecy. According to a 2005 study sponsored by the Minnesota Organization on Adolescent Pregnancy, Prevention and Parenting, 26% of the fathers of children born to teen mothers who were fourteen and younger, were men who were twenty years of age or older. Men who were twenty years of age or older fathered 46% of the children born to Minnesota teen mothers who were between the ages of fifteen and seventeen. Lisa Turnham, *2005 Minnesota State Adolescent Sexual Health Report* at 3 available at http://www.moappp.org/Documents/2005AdoHealthReport.pdf.

North Dakota teens, who were eighteen or younger, were impregnated by men four or more years older 30% of the time. Child Trends, *Facts at a Glance 2005* at 4, available at http://www.childtrends.org/files/Facts_2005.pdf.

While these percentages are disturbingly high, they are still significantly smaller than the 71% found by the most comprehensive study of teen pregnancies done to date. In a study of over 46,000 pregnancies by school-age girls in California, *a state having no parental notification or consent law*, researchers found that:

> 71%, or over 33,000, were fathered by adult post-high-school men whose mean age was 22.6 years, an average of 5 years older than the mothers. . . . Even among junior high school mothers aged 15

> or younger, most births are fathered by adult men 6-7 years their senior. *Men aged 25 or older father more births among California school-age girls than do boys under age 18.*[3]

Other studies have also found that most teenage pregnancies are the result of predatory practices by men who are substantially older.[4]

By encouraging and increasing the contacts between young women and their parents, the Minnesota and North Dakota laws have, as detailed below, been successful in contributing to the health and well being of these young women.

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[3] Mike A. Males, *Adult Involvement in Teenage Childbearing and STD*, LANCET 64 (July 8, 1995) (emphasis added).

[4] *Id.* citing HP Boyer and D. Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy and Child Maltreatment*, FAM. PLAN. PERSPECTIVES at 4 (1992); and HP Gershenson, *et al.*, *The Prevalence of Coercive Experience Among Teenage Mothers*, J. INTERPERS. VIOL. 204 (1989). "Younger teenagers are especially vulnerable to coercive and nonconsensual sex. Involuntary sexual activity has been reported in 74% of sexually active girls younger than 14 years and 60% of those younger than 15 years." American Academy of Pediatrics Committee on Adolescence, *Adolescent Pregnancy – Current Trends and Issues: 1998*, 103 PEDIATRICS 516 (1999), also available on the worldwide web at <http://www.aap.org/policy/re9828.html>. *See also*, M. Joycelyn Elders and Alex E. Albert, *Adolescent Pregnancy and Sexual Abuse*, 280 JAMA 648 (1998).

B. Due, in part, to Parental Involvement Laws Minnesota and North Dakota Have Two of the Lowest Teen Pregnancy Rates in the Country.

1) North Dakota, with its two-parent consent law, has the lowest teen pregnancy rate in the country.

North Dakota enacted a two-parent consent law related to abortion in 1981. It has the lowest teen pregnancy rate in the nation. On average, twenty-one out of a thousand North Dakota teens, ages fifteen to seventeen, became pregnant in 2000. *See* Alan Guttmacher Institute, *U.S. Teenage Pregnancy Statistics: Overall Trends by Race and Ethnicity and State by State Information* (updated Feb. 19, 2004) available at http://www.guttmacher.org/pubs/state_pregnancy_trends.pdf. From 1980 to 1990, while teen birth rate generally increased across the nation, North Dakota was one of eight states that experienced more than a ten percent decline in teen pregnancies. Center for Disease Control, *Teen Pregnancy and Birth Rates – United States, 1990*, 42 Morbidity and Mortality Weekly 733, 735 (Figure 1) (Oct. 1, 1993). "In 1996, the state rate was less than one-half the national rate." Terry Bohn, ed., *Maternal and Child Health Status* p. 41 (2002) available at http://www.ndmch.com/publications/MCHHealthStatusStatistics2002.pdf. Pregnancies of North Dakota teens ages fifteen to seventeen from 1992 to 2000 declined 28% overall. Alan Guttmacher Institute, *U.S. Teenage Pregnancy Statistics: Overall Trends by Race and Ethnicity and State by State Information* (updated Feb. 19, 2004) available at http://www.guttmacher.org/pubs/state_pregnancy_trends.pdf.

Within a year of North Dakota's enactment of its parental consent statute, the abortion rates in North

Dakota began to decline. The rate has declined from an all-time high of 3,706 abortions, near the enactment date, to levels where they have been since 1994, of between 1,200 to 1,400 abortions per year. In 2000, North Dakota's abortion rate was 8 per 1,000 women ages 15-19 compared to a teen abortion rate of 24 per 1,000 nationwide. *See* Alan Guttmacher Institute, *U.S. Teenage Pregnancy Statistics: Overall Trends by Race and Ethnicity and State by State Information* (updated Feb. 19, 2004) available at http://www.guttmacher.org/pubs/state_pregnancy_trends.pdf.

2) Minnesota, with its two-parent notification law, has the fourth lowest teen pregnancy rate in the country.

With the exception of a four-year period during which the law was entirely enjoined subject to judicial review, Minnesota had required some form of parental notification of an immature minor's intent to obtain an abortion since August 1, 1981. *See, Hodgson v. Minnesota*, 497 U.S. 417, 429-33 (1990). During the first decade in which the Minnesota law took effect, the results were dramatic:

- Total pregnancies among teenagers under the age of 18 decreased by 27%.
- The pregnancy rate went down 19%.
- The birth rate for teens decreased by 18%.
- The total number of abortions decreased by 34%.
- The abortion rate decreased by 26%.

See, Center for Health Statistics, Minnesota Department of Health, *Pregnancy Outcomes and Pregnancy Rates by Age of Women, Minnesota Residents*, 1980-1988, 1990. In

the years just before the law was enacted in 1981, all of these figures increased. *Id.*

Moreover, the data reveals that there has been a sustained change for the better. During this period, Minnesota's rates of teen pregnancy remained significantly lower than other states – approximately half of the same rates for girls 13 to 17 as the national average and at least one-third less than the United States' average among all teens. This consistent pattern of decline after the enactment of the parental notification law supports the conclusion that the law has facilitated pregnancy avoidance among teens. *See* J.L. Rogers, et al., *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 Amer. J. Pub. Health 294–298 (1991); Charlotte Ellertson, *Mandatory Parental Involvement in Minors' Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana*, 87 Amer. J. Pub. Health 1367–1374 (1987); and Phillip B. Levine, *Parental Involvement Laws and Fertility Behavior*, 22 J. Health Econ. 861, 871 (Sept. 2003) (finding that abortion rates decline with no increase in teen births).

II. There Is No Evidence that the Absence of a "Health Exception" Has Adversely Impacted Minnesota Minors.

During the initial six years when parental notification was required, there was not a single report of medical complications caused by the law, or a single case of parental prevention or coercion of an abortion. *See* Hubert H. Humphrey, III, Attorney General of the State of Minnesota, *Background Briefing Concerning the Minnesota Parental Notification Law* at 3 (attached as "Appendix A"). *See also* Brief of Cross Petitioners at 10-11, 18, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) and Brief of Association of

American Physicians and Surgeons at 23-25, *Hodgson v. Minnesota*, 497 U.S. 417 (1990). A review of the Health Department statistics following the *Hodgson* case make clear that the nature and extent of complications remain stable over time – and unrelated to the state's parental notification law. *See* "Appendix B."

To the contrary, the success Minnesota has enjoyed in simultaneously reducing its teen pregnancy and abortion rates argues in favor of preserving parental involvement.

CONCLUSION

For all the foregoing reasons, *amici curiae* respectfully urge the Court to reverse the judgments of the lower courts.

Respectfully submitted,

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August 2005

Complications of Induced Abortions
Minors (< age 18)

	Total	Heavy Bleeding	Infection	Incomplete Abortion	Failed Abortion	Post-Abortal Syndrome	Cervical Injury	Fever	Uterine Perforation	Other
1991	5	2	0	2	0	0	0	1	0	0
1992	11	2	4	0	0	4	1	0	0	0
1993	6	2	0	2	1	1	0	0	0	0
1994	10	5	2	1	0	1	0	0	0	1
1995	5	3	0	0	0	2	0	0	0	0
1996	6	3	0	2	0	1	0	0	0	0
1997	1	1	0	0	0	0	0	0	0	0
1998	5	0	1	2	0	0	0	0	1	1

--------change in reporting form*----------

	Total	Heavy Bleeding	Cervical Laceration	Uterine Perforation	Other
1999	9	0	6	1	2
2000	3	1	1	0	1
2001	2	0	1	0	1
2002	3	1	2	0	0
2003	4	0	4	0	0
2004	2	0	2	0	0

*Note: Age of patient is not collected on the form for reporting post-operative complications, thus, only intra-operative complications are included in this table.

State of Minnesota

OFFICE OF THE ATTORNEY GENERAL

[SEAL]

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

BACKGROUND BRIEFING CONCERNING THE MINNESOTA PARENT NOTIFICATION LAW

On November 29, 1989, the United States Supreme Court will hear arguments in the cases of *Hodgson et. al. v. State of Minnesota et. al.* and *State of Minnesota et. al. v. Hodgson et. al.* concerning the constitutionality of a Minnesota law which generally requires that the parents of minors be notified at least 48 hours before an abortion is performed upon their daughter.

Because of the volume of inquiries we have received about this case, this briefing paper has been prepared to clarify the provisions of the Minnesota law and the issues involved in the case.

The Statute

The statute in question is Minnesota Statutes section 144.343, subdivisions 2-7. The statute was enacted by the Minnesota legislature in 1981. A copy of it is attached for your reference.

This Minnesota law is unique in that it contains alternative versions for notification. The first, sometimes called the "pure notice" version, requires that the physician or an agent make a reasonably diligent effort to notify the parents of a minor at least 48 hours before an abortion is performed upon her. The notice must be written and can

be delivered either in person or by certified mail. If the notice is mailed, it is deemed to be received at noon on the next mail delivery day after mailing. The notice alone is sufficient to satisfy the law. No consent or other action of the parents is required.

The notice requirement does not apply to:

1. Minors who are emancipated (living apart from parents, managing her own affairs or has been married or had a child).
2. Parents who are deceased or can't be located through reasonably diligent effort.
3. Cases where prompt abortion is needed to save the girl's life.
4. Girls who de are that they have been the victim of abuse or neglect.
5. Cases where the parents have consented to the abortion.

The second version is the "notice/bypass" alternative. This version provides that if the "pure notice" law is enjoined by a court, then the notice provisions of the law explained above shall be in effect with the addition of a court/bypass option. That option allows a girl who does not want to notify her parents to obtain an abortion without parental notice if a judge determines that either (1) she is "mature" enough to consent to the abortion on her own, or (2) if not, her "best interest" would be served by going ahead without notice to her parents. The law requires that the court process be free, expeditious and confidential.

History Of The Case

On July 30, 1981, two days before the law was to take effect, a number of minors, a parent of one minor and four abortion clinics (the "plaintiffs") began an action in federal court challenging the Minnesota law under both the state and federal constitutions. Enforcement of the "pure notice" version of the law was restrained by the court before its effective date. However, the court did not restrain the "notice/bypass" version which went into effect on August 1, 1981. The "notice/bypass" version remained in effect until November 6, 1986 when further enforcement was enjoined by the district court following a lengthy trial.

The state appealed to the Eighth Circuit Court of Appeals. On August 27, 1987 a three-judge panel of the court affirmed the district court decisions. The state sought, and was granted, a rehearing by the entire Eighth Circuit Court of Appeals. On August 8, 1988, the court of appeals issued its decision which affirmed the district court decision that the "pure notice" version of the law was unconstitutional. However, the circuit court overturned the district court judgment as to the "notice/bypass" version and found it to be constitutionally permissible under controlling Supreme Court precedents.

Because the circuit court stayed its mandate to allow the plaintiffs time to seek review by the U.S. Supreme Court, the law did not become again enforceable as a result of the decision. On January 5, 1989, the plaintiffs petitioned the Supreme Court for review of the circuit courts decision upholding the notice/bypass version of the law. That petition is captioned *Hodgson et. al. v. State of Minnesota et. al.*, Supreme Court file number 88-1125.

On February 2, 1989, the state filed a cross-petition seeking review of the circuit's decision striking down the "pure notice" version of the law. That case is captioned *State of Minnesota et. al. v. Hodgson et. al.*, Supreme Court File Number 88-1309.

On July 3, 1989, the same day that it announced the *Webster* decision, the Supreme Court agreed to hear both the petition and the cross petition. This granting of review has the effect of further staying to the decision of the Eighth Circuit so the law remains unenforceable.

The Argument

While some have suggested that the Minnesota case, along with cases from Ohio and Illinois may be used to urge the court to overrule its decision in *Roe v. Wade*, the state of Minnesota does not seek the reconsideration of *Roe*, nor is any retreat from *Roe* needed to uphold either the Minnesota pure notice or notice/bypass law. Both versions of the law permit a pregnant girl to decide with her doctor whether to have an abortion without the consent of anyone else. It merely requires that, where the girl is not abused or emancipated and there is no life threatening emergency, her parents be informed of the impending abortion in advance.

Pure Notice

The concept that the "custody, care and nurture of children reside first in the parents" is a cardinal principle in our society. Indeed the right of parents to raise and educate their children was one of the established concepts noted in *Roe v. Wade* itself.

The Supreme Court has recognized that the right to abortion is not absolute but must be considered against other important state interests. In the specific case of minors, the Court has determined that the state has an important interest in promoting parental involvement in a critical time in a child's life resulting from pregnancy and an abortion. Because of the unique and nonpostponable nature of the abortion decision, however, the Court has determined that parents cannot be given an absolute veto power over a minor's abortion decision. Therefore, the Court has held that a state may require parental *consent* to a minor's abortion but only if it also provides for recourse to a court alternative to obtaining consent.

The state of Minnesota argues that since the notice requirement gives no one a legal veto over the minor's abortion decision, no court bypass should be needed. The notice requirement represents a permissible balance between the abortion rights of minors and the strong and proper interests of the state and parents in parental involvement in crises in the lives of children.

The fact that there may exist some unhelpful obstructive or even abusive parents is not a sufficient reason to deny the majority of parents knowledge of their daughters crisis. In fact, during the period when the notice/bypass law was in effect, fear of abuse or obstruction was given by girls as the reason to avoid notice in only a small minority of cases. The most common reason was "fear of damaging the parent-child relationship."

Notice/Bypass

The notice/bypass law was in effect for some five years. The evidence indicates that the proportion of

minors whose parents were notified at least doubled during the time the law was in effect. Approximately 40 to 50 percent of minors, however, elected to pursue the bypass option. Of the 3,533 who went to court between August 1, 1981 and March 1, 1986, most were granted permission to obtain an abortion without parental notice. The district court found that the bypass system operated in an expeditious and confidential manner as required by the Supreme Court guidelines.

The plaintiffs assert that the record of the notice/bypass system in actual operation demonstrates that it resulted in unconstitutional burdens to Minnesota minors. However, after some five years of the statute's operation, the evidence does not disclose a single instance of abuse or forceful obstruction of abortion for any Minnesota minor. The plaintiffs also conceded that there was no evidence of any increase in medical complications which could be attributed to the law. Thus, it is the position of the state that the record of the Minnesota law in actual operation provides no basis for the Supreme Court to abandon the principles it has set forth for establishing permissible parental involvement in children's abortion decisions. To the contrary, it demonstrates that a notice/bypass system can work confidentially and expeditiously with out [sic] the occurrence of unfortunate consequences which are often predicted.

No. 04-1144

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KELLY AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY, *Petitioner,*

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *et al.*, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OUT OF TIME AND BRIEF *AMICI CURIAE*

The Governors of Minnesota and North Dakota move for leave to file the attached *amici curiae* brief in this case, notwithstanding that the time for filing such briefs expired on Monday, August 8, 2005. This extension is justified by the fact that counsel for *amici curiae* was attending to her child who had a ruptured appendix and was hospitalized from July 27 to August 3, 2005. The child returned to the hospital briefly for further testing on August 5, 2005 to determine if an abscess had developed.

Counsel has pursued the preparation of this brief with diligence. Counsel for the parties in this case were served electronically on August 15, 2004 to insure minimum delay in their access to its contents. The parties have consented to the filing of this brief.

Respectfully submitted,

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